No. 18672

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL SHIPPERS' ASSOCIATION, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

JURISDICTION AND STATEMENT OF THE CASE.

The United States Attorney for the Southern District of California filed Information No. 30731-CD on April 16, 1962, charging appellant Continental Shippers' Association with violating the Elkins Act, Title 49, United States Code, Section 41(1), by receiving discriminatory credit extensions on five rail shipments occurring between August, 1960 and April, 1961. On May 31, 1962, appellant's motion for judgment of acquittal at the conclusion of the Government's case was granted by the trial judge who stated: "I think in this case that there is no showing that the defendant did actually obtain a special concession or discrimina-

tion in its favor. That is the basis of the ruling." [R.T.P. p. 123.][1]

Information No. 31091-CD was filed on August 15, 1962, charging appellant with violating the Elkins Act by receiving discriminatory credit extensions on thirty rail shipments occurring between December, 1961 and February, 1962. On October 22, 1962, appellant entered pleas of not guilty to all counts and moved to dismiss the Information on the asserted ground that the matters contained therein had been previously adjudicated by case No. 30731-CD. Appellant's motion was denied on November 20, 1962, and on December 14, 1962, appellant was found guilty on all counts in a jury trial before the Honorable E. Avery Crary, United States District Judge. Appellant's alternative motions for a new trial or judgment of acquittal were denied on January 24, 1963, and on the same date appellant was sentenced to pay a fine of $1,000 on each count; execution of the sentence as to counts 21 through 30 was suspended. On February 1, 1963, appellant gave notice of appeal.

The District Court had jurisdiction to try the case under Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294.

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[1]R.T.P. refers to the reporter's transcript of the previous trial in case No. 30731-CD; R.T. refers to the reporter's transcript in case No. 31091-CD, from which this appeal is taken; C.T. refers to the clerk's transcript in the latter case.

II.

STATUTES AND REGULATIONS INVOLVED.

Title 49, United States Code, Section 41(1), provides in pertinent part that:

> "It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter [chapter 1] whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000."

Title 49, United States Code, Section 3(2) provides in pertinent part that:

> "No carrier by railroad . . . subject to the provisions of this chapter shall deliver or relinquish possession at destination of any freight . . . transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination. . . ."

Interstate Commerce Commission Ex Parte Order No. 73, 49 C.F.R., Part 142 (1958), contains the following pertinent provisions:

Section 142.2: "Where retention of possession of freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt release of equipment or station facilities, the carrier, upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit period specified in this part may relinquish possession of the freight in advance of the payment of the tariff charges thereon and may extend credit in the amount of such charges to shippers for a period of 96 hours to be computed as set forth in this part."

Section 142.7: "Where the freight bill is presented to the shipper subsequent to the time the freight is delivered, the . . . 96-hour periods of credit shall run from the first 12 o'clock midnight following the presentation of the freight bill."

Section 142.9: "Shippers may elect to have their freight bills presented by means of the United States mails, and when the mail service is so used the time of mailing by the carrier shall be deemed to be the time of presentation of the bills. In case of dispute as to the time of mailing the post mark shall be accepted as showing such time."

Section 142.10: "In the computation of the various periods of credit Saturdays, Sundays, and legal holidays may be excluded, and where the time for presentation to shippers of freight bills for transportation and related charges falls on Satur-

day, Sunday or a legal holiday such bills may be presented prior to 12 o'clock midnight of the next succeeding regular work day."

Section 142.11: "The mailing by the shipper of valid checks, drafts, or money orders, which are satisfactory to the carrier, in payment of freight charges within the credit periods allowed such shipper may be deemed to be the collection of the tariff charges within the credit period for the purposes of the rules in this part. In case of dispute as to the time of mailing the post mark shall be accepted as showing such time."

Section 142.1b: "Effective on March 10, 1961, the rail carriers subject to the jurisdiction of the Interstate Commerce Commission are hereby authorized to extend credit for . . . 120 hours in respect of charges on carload traffic, in lieu of . . . 96 hours . . . under the present rules in this part, computation of time to be made in the same manner as provided in connection with the . . . 96-hour periods."

III.

STATEMENT OF FACTS.

During the period from December 8, 1961 to February 8, 1962, appellant made the thirty rail shipments, charged in the thirty counts of the Information, from Chicago, Illinois, to Los Angeles, California, by Southern Pacific Company, an interstate carrier subject to the Interstate Commerce Act. [R.T. 31-32, 220, Exs. 1-30, 1A-30A.] Of the thirty freight bills subsequently presented to appellant, five [Exs. 26A-30A; Counts 26-30] were paid by appellant on December

26, 1961, six to eleven days beyond the credit period allowed by the Interstate Commerce Commission; one [Ex. 25A; Count 25] was paid by appellant on March 22, 1962, 48 days beyond the period allowed; and the remaining twenty-four bills [Exs. 1A-24A; Counts 1-24] were still unpaid at the time of trial. [R.T. 107.] At the time the Information was drafted, the latter twenty-four freight bills had been unpaid for periods ranging from 151 to 168 days beyond the credit period allowed by the I.C.C.

Horace A. Sumner, terminal freight agent of the Southern Pacific Company at Los Angeles, California, testified that the Southern Pacific Company requires shippers who have been extended credit to pay bills for freight charges within 120 hours—excluding Saturdays, Sundays and holidays—after the bills are mailed out for payment. [R.T. 38.] Sumner said that several steps are taken by Southern Pacific Company to make certain that shippers know of and comply with the 120 hour credit period. When an application for credit is approved the applicant is sent a letter outlining the credit requirements together with a copy of the Interstate Commerce Commission order Ex Parte 73. [R.T. 44-45.] Before freight bills are mailed to shippers they are stamped to show the date they become delinquent. [R.T. 45-46.] After the bill is mailed, follow-up letters and telephone calls are used to notify shippers that a bill is due or delinquent. [R.T. 47-48.] As a final step, credit of a shipper who fails to pay within the required period is suspended. [R.T. 48.] The credit of appellant was suspended by Southern Pacific Company on two occasions. After the first suspension, credit was reinstated upon appellant's assur-

ance that payments in the future would be made within the credit period. [R.T. 48-49.]

A series of letters and a credit application sent to appellant gave notice of the period for which Southern Pacific Company could extend credit under I.C.C. regulations, and advised of appellant's failures to pay within the required period. [Exs. 31, 32, 32A, 33, 34, 35, 36, 38, 39, 40, 41, 42, 43; R.T. 99, 152.] Letters from appellant [Exs. 32A, 37; R.T. 99, 152] acknowledged that appellant was aware of the restrictions governing credit set down by the I.C.C. and agreed to abide by them.

Winfred J. Schafer, cashier for the Southern Pacific Company in Los Angeles, testified that in the year prior to December, 1962, Southern Pacific Company had several thousand shippers shipping into and out of Los Angeles. [R.T. 111-112.] There were approximately 100,000 freight bills issued in that year. [R.T. 112.] Ultimately, less than one percent—possibly one-tenth of one percent—of these freight bills were not paid within the required credit period. [R.T. 117.]

In Mr. Schafer's experience, appellant had been delinquent in the payment of its freight bills on more occasions, for longer periods of time, and in larger amounts of money than any other shipper. [R.T. 141-143.]

Louis C. Platz, assistant terminal freight agent of the Southern Pacific Company at Los Angeles, testified that on about February 6, 1962, he received a telephone call from Mr. Essaf, treasurer of Continental Shippers' Association, Media, Pennsylvania, in which Mr. Essaf advised that appellant would be going

through a reorganization and because of this would be a little slow in the payment of freight bills. Essaf asked that Southern Pacific Company be "understanding" about the matter. [R.T. 155-159.]

Howard A. Edwards, industrial agent for Southern Pacific Company, testified that on about October 24, 1960, he had a telephone conversation with Ron Denkler, appellant's Los Angeles manager, during the course of which Denkler advised that Mr. Schulman, head of Continental Shippers' Association, might route all future traffic by another carrier because Southern Pacific had suspended appellant's credit. [R.T. 160-164.]

W. H. Alexander, assistant to the auditor of freight accounts for the Southern Pacific Company in San Francisco, testified that appellant was delinquent in the payment of freight bills in the amount of $5,015.55 due at San Francisco in the year 1962. [R.T. 173-174.]

Lamoine F. Andreas, former general agent for the Southern Pacific Company at Philadelphia, Pennsylvania, testified that from about April, 1960 until about February, 1962, he and his subordinates contacted appellant about 75 to 100 times concerning freight bills that were not being paid on time. [R.T. 178, 186.] Appellant on many occasions advised Andreas that he could expect little or no difficulty in obtaining payment of freight bills on time in the future because appellant was going to take care of the matter. [R.T. 208-209.] On approximately 35 occasions Andreas was advised by appellant's representatives that appellant was mailing a check to cover a delinquent freight bill when in fact the check was not so mailed. [R.T. 185, 186.] On several occasions appellant threatened to take its business away from Southern Pacific Company if the

railroad gave appellant any further trouble on the matter of credit. [R.T. 186.] After appellant's credit was suspended in 1962, Andreas was given the assignment of collecting approximately $35,000 in delinquent freight charges from appellant. [R.T. 196, 197.] Appellant's representatives asked Andreas for more time in which to pay these bills. [R.T. 198.] Southern Pacific Company agreed not to bring suit for a period of time in which appellant could pay its bills. [R.T. 201-202.] On approximately June 5, 1962, appellant's representatives said it could not meet its obligations to Southern Pacific and suggested an installment type of payment. [R.T. 203.] Sometime prior to March 6, 1962, Mr. Ettelman, appellant's managing director, told Andreas that appellant had between $40,000 and $50,-000 in the bank. [R.T. 205-206.]

A defense witness, Miss Lucy W. McCall, bookkeeper for appellant, identified financial statements of appellant. [Exs. D-P.] She said that appellant ships for its members who in turn pay appellant later, and that the largest debts outstanding to appellant are owed by its members. [R.T. 352-353.] One of appellant's financial problems is past due accounts of its members. [R.T. 354-355.]

Irwin Ettelman, appellant's former managing director identified a compilation showing whether checks in payment of freight bills during the period June 16, 1960, to May 12, 1961, were written before or after the bills became delinquent. [Ex. Q.] From its inception appellant was in poor financial condition. [R.T. 379.] Ettelman realized that appellant might not be able to pay its freight charges on time, but went ahead and shipped anyway. [R.T. 380-381.] Appellant al-

lows its members 48 hours to pay freight charges but only about 20 per cent pay within that time. [R.T. 386.]

IV.

SUMMARY OF ARGUMENT.

A. The Elkins Act Is to Be Broadly Interpreted to Achieve Its Purpose of Preventing Discrimination in Interstate Commerce.

B. Appellant's Prosecution Was Not Barred by Previous Adjudication.

1. The Doctrine of Double Jeopardy Does Not Apply.
2. The Doctrine of Collateral Estoppel or Res Judicata Does Not Apply.

C. The Evidence as to All Essential Elements of the Offense Was Sufficient to Sustain Appellant's Conviction.

1. The Government Proved Appellant's Acts of Causing Property to Be Transported in Interstate Commerce by a Common Carrier.
2. The Government Proved Appellant's Act of Soliciting, Accepting or Receiving, in Respect to Such Transportation, a Concession or Discrimination Whereby an Advantage Was Obtained and Discrimination Practiced.
3. The Government Proved That Appellant Knew It Was Obtaining the Particular Concessions and Discriminations Involved.

D. The Trial Court Did Not Err in Receiving Evidence.

1. Exhibits 31, 33, 34, 35, 36, 38, 39, 40, 41, 42 and 43 Were Properly Admitted Into Evidence.
2. Testimony Received Did Not Violate the Best Evidence Rule.
3. Evidence of a Telephone Conversation With a Representative of Appellant Was Properly Received.

E. The Court Did Not Err in the Giving or Refusing of Instructions.

1. Instructions as to I. C. C. Regulations Were Properly Given.
2. The Instruction as to What Constitutes a "Concession" or "Discrimination" Was Correct.
3. The Court's Instruction on Intent Was Correct.
4. The Court's Instruction With Respect to Knowledge of or Collusion by the Carrier Was Correct.
5. The Court Correctly Instructed on the Law of Agency.
6. The Court Correctly Instructed With Respect to Discrimination and "Unjust" Discrimination.
7. The Court Was Correct in Refusing Appellant's Proposed Instruction No. 19.
8. The Court Was Correct in Refusing Appellant's Proposed Instruction No. 23.
9. The Court Correctly Refused Appellant's Proposed Instruction No. 26.

V.

ARGUMENT.

A. The Elkins Act Is to Be Broadly Interpreted to Achive Its Purpose of Preventing Discrimination in Interstate Commerce.

The Elkins Act was enacted to eliminate concessions or discriminations from the handling of commerce so that persons and places might carry on their activities on an equal basis. Favoritism which destroys equality between shippers, however brought about, is not tolerated. It is the object of the Act to require equal treatment of all shippers and prohibit unjust discrimination in favor of any of them, to prevent favoritism by any means or device whatsoever, to prohibit practices which run counter to the purpose of the Act to place all shippers on equal terms, and to cut up by the roots every form of discrimination, favoritism, and inequality.

Union Pacific Railroad Co. v. United States, 313 U. S. 450, 461-462 (1941);

United States v. Union Stock Yards, 226 U. S. 286, 307, 309 (1912);

Louisville & Nashville v. Mottley, 219 U. S. 467 (1911).

The Supreme Court has said of the Elkins Act, in *United States v. Koenig Coal Co.,* 270 U. S. 512 at 519 (1926), that "the general rule that criminal statutes are to be strictly construed has no application when the general purpose of the legislation is manifest and is subserved by giving the words used in the statute their ordinary meaning and thus covering the acts charged."

B. Appellant's Prosecution Was Not Barred by Previous Adjudication.

1. The Doctrine of Double Jeopardy Does Not Apply.

A defendant cannot be further prosecuted for an offense of which he has once been acquitted. *Green v. United States,* 355 U. S. 184 (1957). However, to constitute double jeopardy, it is not enough that the second prosecution arise out of the same or similar facts as the first; the second prosecution must be for the exact same offense, and the general test of the identity of offenses is whether identical evidence is required to sustain them. *Gore v. United States,* 357 U.S. 392 (1958); *Morgan v. Devine,* 237 U.S. 632 (1915); *Bacom v. Sullivan,* 200 F.2d 70 (5th Cir. 1952); *cert. denied* 345 U.S. 910 (1953); *Williams v. United States,* 179 F.2d 644 (5th Cir. 1950); *cert. denied* 341 U.S. 70 (1951); *La Page v. United States,* 146 F.2d 536 (8th Cir. 1945).

In the present case there is no double jeopardy since the shipments in connection with which appellant was charged with receiving concessions in Information 30731-CD are entirely different shipments from those involved in case No. 31091-CD. The cases uniformly hold that each shipment, or each payment for shipments, on which a concession is received constitutes a separate and distinct offense. *Grand Rapids & I. Ry Co. v. United States,* 212 Fed. 577 (6th Cir. 1914); *cert. denied* 234 U.S. 762 (1914); *United States v. Standard Oil of N.Y.,* 192 Fed. 438 (S.D.N.Y. 1911); *United States v. Standard Oil Co.,* 170 Fed. 988 (N.D. Ill. 1909); *United States v. Bunch,* 165 Fed. 736 (D. Ark. 1908); *United States v. Stearns Salt & Lumber Co.,* 165 Fed. 735 (D.C. Mich. 1908); *United States v. Vacuum Oil Co.,* 158 Fed. 536 (S.D.N.Y. 1908).

2. The Doctrine of Collateral Estoppel or Res Judicata Does Not Apply.

In *Frank v. Mangum,* 237 U.S. 309, 333-334 (1915) the Supreme Court said:

> "It is a fundamental principle of jurisprudence . . . that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. * * * The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction."

To the same effect is *United States v. Oppenheimer,* 242 U.S. 85, 87 (1917). See also *Cosgrove v. United States,* 224 F.2d 146 (9th Cir. 1955).

The area in which the doctrine of collateral estoppel applies is very narrow. As was said in *United States v. Rangel-Perez,* 179 F. Supp. 619, 622-623 (S.D. Cal. 1959):

> "To be conclusive in a subsequent criminal proceeding by virtue of the doctrine of collateral estoppel, the facts determined by the earlier judgment must of course have been fully tried and necessarily adjudicated in order to reach judgment on the issues involved in the essential elements of the crime charged."

The criminal cases in which the doctrine of collateral estoppel has been held a *bar* to subsequent prosecutions are only those in which an *essential element* of the second charge has already been adjudicated adversely to the Government. As was said in the case of *United States v. Kenny,* 236 F.2d 128 (3d Cir. 1956), where an accused is charged with two related

offenses arising from the same facts, his acquittal on one charge precludes his subsequent prosecution on the other charge only if the acquittal was the result of a decision in his favor on an issue which would be essential to the case against him on the second offense. One example of cases within this category is *United States v. Carlisi,* 32 F. Supp. 479 (E.D.N.Y. 1940), in which, in a prosecution for conspiracy to set up stills, testimony of agents who had made a search and seizure which were held illegal in a previous prosecution of the defendant on a charge of possessing the still, was held inadmissible because the decision that the search and seizure were illegal was "res judicata" of the rights of the parties. Other cases in this category include *Yawn v. United States,* 244 F.2d 235 (5th Cir. 1957); *United States v. Simon,* 225 F.2d 260 (3d Cir. 1955); *Cosgrove v. United States,* 224 F.2d 146 (9th Cir. 1954); *Sealfon v. United States,* 332 U.S. 575 (1948); *United States v. Meyerson,* 24 F.2d 855 (S.D.N.Y. 1928); and *United States v. McConnell,* 10 F.2d 977 (E.D. Pa. 1926).

Where proof of an essential element of a subsequent prosecution is not precluded by virtue of that issue's adjudication in a previous case between the same parties, the doctrine of collateral estoppel may still apply, not as a bar to the second prosecution, but when the Government attempts to relitigate an issue determined by the previous case, which is not necessarily an essential element of the subsequent case. An illustrative case is *United States v. Maybury,* 274 F.2d 899 (2d Cir. 1960), in which it was said that a previous acquittal on an indictment for the forgery of a United States Treasury Check would not operate as

res judicata in the trial of the same defendant on a subsequent indictment for uttering the same forged check. The Government would only be estopped from contending that the defendant himself had forged the check.

The narrow scope of the doctrine of collateral estoppel is well illustrated by a third group of cases in which the doctrine was held not to apply even though the successive prosecutions involved arose out of the same transaction or were closely related. In *Williams v. United States,* 170 F.2d 319 (5th Cir. 1948), a defendant's acquittal at a former trial for receiving certain sugar in exchange for ration stamps which he knew were acquired unlawfully, was held not to constitute *res judicata* with respect to a second prosecution charging the unlawful acquisition, use and transfer of the same ration stamps. *United States v. Kaadt,* 171 F.2d 600 (7th Cir. 1949), held that where a defendant was acquitted of the offense of using the mails to defraud by advertising a treatment for diabetics, the acquittal was not *res judicata* in a subsequent prosecution for the shipment of misbranded drugs for the cure of diabetics, where the intent to defraud was not an essential element of the latter offense. *United States v. Kenny,* 236 F.2d 128 (3d Cir. 1956), involved a defendant who, in a prior prosecution of the members of his partnership, was acquitted on a charge of making false statements to a Government agency about contracts. This acquittal was held not to be *res judicata* in a subsequent prosecution against the defendant for having concealed his interest in the contracts as a partner, since the jury could have based its acquittal on the ground that he lacked criminal intent in making the false statement, rather than on the basis that he was not a partner.

From examination of the cases in the three categories mentioned above it is evident that the relationship of cases No. 30731-CD and No. 31091-CD bears no resemblance to that of the cases where the doctrine of collateral estoppel has been held to apply. The offenses charged in No. 30731-CD are no more similar to those charged in No. 31091-CD that would be the offenses charged against a bank robber who had robbed the same bank on occasions several months apart by using the same *modus operandi.*

There are no facts or issues in the present case No. 31091-CD which were determined or adjudicated in previous case No. 30731-CD. To illustrate this point, each element of the present case is discussed below with respect to what was at issue in the previous case.

(1) *Defendant's Causing to Be Made, the Specific Interstate Rail Shipments Involved.*

In the previous case, the shipments were five specific ones occurring during the period August, 1960 to April, 1961.

In the present case, the shipments were thirty specific ones occurring during the period December, 1961, to February, 1962. These entirely different facts were proved by entirely different evidence.

(2) *Defendant's Obtaining a Discriminatory Concession With Respect to the Specific Shipments Involved.*

In the previous case the Government offered evidence to prove that appellant received discriminatory credit extensions on sums of money due on the Au-

gust, 1960, to April, 1961, shipments, which credit extended for periods ranging from 41 to 13 days beyond the 96-hour period allowed by I.C.C. regulations.

In the present case, the Government offered evidence to prove that appellant received discriminatory credit extensions on entirely different sums of money due on the entirely different shipments occurring during December, 1961, to February, 1962, which credit extended for entirely different periods ranging from 168 to 6 days beyond the new 120-hour period allowed by I.C.C. regulations.

(3) *Defendant's Knowledge That It Was Receiving Discriminatory Concessions on the Specific Shipment Involved.*

In the previous case the Government offered evidence to prove that appellant knew it was receiving discriminatory credit extensions on specific sums due on specific shipments.

In the present case, the Government offered evidence to prove that appellant knew it was receiving discriminatory credit extensions on entirely different sums due on entirely different shipments.

In view of the differences between the facts and issues involved in the previous prosecution and those in the present case, it is obvious that case No. 30731-CD could not and did not determine or adjudicate any fact or issue involved in Case No. 31091-CD.

C. The Evidence as to All Essential Elements of the Offense Was Sufficient to Sustain Appellant's Conviction.

1. The Government Proved Appellant's Acts of Causing Property to Be Transported in Interstate Commerce by a Common Carrier.

This element of the Government's case was established by stipulation. [R.T. 31-32, 220.]

2. The Government Proved Appellant's Acts of Soliciting, Accepting or Receiving, in Respect of Such Transportation, a Concession or Discrimination Whereby an Advantage Was Obtained and Discrimination Practiced.

Appellant "solicited" the credit extensions it obtained through its failure to pay freight bills within the required credit period by the following acts: (1) agreeing to abide by I.C.C. credit regulations if credit were given to appellant [Ex. 32A]; (2) shipping with the knowledge that appellant might not be able to pay its freight bills within the required period [R.T. 380-381]; (3) threatening to take its business away from Southern Pacific if appellant's credit was suspended for failure to pay on time, or if appellant were given any further trouble on the matter of credit [R.T. 160-164, 186]; (4) asking the carrier to be "understanding" about appellant's lateness in paying freight charges caused by a company reorganization [R.T. 155-159]; (5) advising the carrier who was inquiring about payment of delinquent bills, that a check in payment thereof was being mailed that day when in fact the check was not being mailed [R.T. 185, 186]; (6) advising the carrier that appellant's bank balance was larger than it really was [R.T. 205-206, 345]; (7) asking the

carrier for more time in which to pay the $35,000 in delinquent freight charges it was trying to collect [R.T. 198]; and (8) agreeing that the carrier would not sue for delinquent freight charges during a period in which appellant would try to pay them. [R.T. 201-202.]

Appellant "received" or obtained credit extensions beyond the 120-hour limit allowable by shipping its freight and not paying therefor until some six to 168 days beyond the allowable limit. [Exs. 1A-30A; R.T. 31-32, 107.]

The credit extensions appellant obtained constitute "concessions" or "discriminations" because appellant obtained them while other shippers did not. Southern Pacific was forbidden to give such extensions to other shippers by the Interstate Commerce Act, 49 U.S.C. §3(2), and I.C.C. Ex Parte Order 73 made pursuant thereto; and it is presumed that the law was obeyed. *Cavness v. United States,* 187 F.2d 719, 723 (9th Cir. 1951), *cert. denied,* 341 U.S. 951 (1951). In addition, it was shown that about 99.9 per cent of Southern Pacific freight bills were paid within the required credit period. [R.T. 117.]

By obtaining credit extensions not available to other shippers an "advantage" was obtained by appellant and a "discrimination" was practiced against other shippers in that the credit extensions permitted appellant to operate on Southern Pacific Company's capital without interest and gave appellant time to attempt to collect from its members the money for freight charges due the railroad. Other shippers who paid within the credit period had to operate on their own capital or money borrowed with interest.

3. The Government Proved That Appellant Knew It Was Obtaining the Particular Concessions and Discriminations Involved.

Appellant's knowledge that there were limitations on the period of credit available to railroad shippers, and that when appellant failed to pay in the required period it was receiving credit that was not available to other shippers, is shown by the following:

(a) *Exhibit 32A,* appellant's application for credit dated June 15, 1960, states:

> "On behalf of Company, I certify we are familiar with and agree to abide by the Interstate Commerce Commission Rules and Regulations pertaining to the payment of transportation and other tariff charges as set forth on the *reverse side* of this credit application form. It is further understood that under the law a carrier is required to discontinue further credit when a patron violates the time allowed for payment of tariff charges."

(b) *Exhibit 31,* a letter to appellant dated August 22, 1960, before its credit was approved, states:

> "Our records indicate that your settlement of freight transportation charges are [sic.] not being made within the authorized credit period, as prescribed by order of the Interstate Commerce Commission.
>
> "Date of delinquency is imprinted on all freight bills; therefore, your sub-departments can readily detect the due date.
>
> "The law requires both shipper and carrier to comply with the order and provides heavy penalties for violation. * * *"

(c) *Exhibit 32,* a notice of appellant's credit approval dated August 30, 1960, states:

> "Since credit extended to patrons by rail carriers is subject to regulations and time limitations prescribed by the Interstate Commerce Commission, copy of the Commission's Order Ex Parte 73 covering the subject is enclosed for your information and guidance."

(d) *Exhibit 33,* a letter to appellant, dated September 23, 1960, states:

> "We wrote you on 8-22-60, calling attention to delay in receipt of settlement for freight transportation charges. Delinquencies are still continuing and we are again requesting your co-operation.
>
> "We have previously advised you that it is unlawful for carriers to extend credit beyond the period provided by the rules of the Interstate Commerce Commission. Representatives of the I.C.C. are constantly investigating the records of rail carriers to ascertain if there have been any violations of the law in respect to preference or advantages allowed one shipper over another through the extension of credit, or otherwise contrary to the orders of the Interstate Commerce Commission. Heavy penalties for such violations may be imposed on shipper (consignee or consignor) as well as on the carrier.
>
> "Continuation of credit is contingent upon settlements being made within the prescribed period and we would regret exceedingly the necessity of suspending your credit, but if delays in payment continue we will have no alternative."

(e) *Exhibit 34,* a notice of credit suspension, dated October 25, 1960, states:

> "Your attention has heretofore been called to the fact that our records indicate you were not making settlement of transportation charges, in all cases, within the authorized credit period, as prescribed by order of the Interstate Commerce Commission.
>
> "Inasmuch as you are still not settling such transportation charges within the credit period prescribed, we are, in order to protect the carriers as well as your selves against a possible indictment under the law, effective immediately, removing your name from our credit list and requiring payment of charges on 'Collect' shipments consigned to you, and 'Prepaid Shipments' forwarded by you, before delivery or forwarding of such shipments.
>
> "This action is not intended as a reflection on your financial stability, but it is resorted to as a means of preventing possible prosecution and fine which may be assessed against both patron and carrier for violation of the Commission's order.
>
> "Should you at any future time desire reinstatement on the credit list, your request in writing will be given due consideration provided there are no delinquent unpaid charges and your assurance is given in writing that payment of future charges will be made within the authorized credit period."

(f) *Exhibit 35,* a letter to appellant dated January 31, 1961, after its credit was reinstated, similar to Exhibit 33, warns appellant of delinquencies.

(g) *Exhibit 36,* a letter to appellant dated February 16, 1961, similar to Exhibits 33 and 35 warns appellant of delinquencies.

(h) *Exhibit 37,* a letter from appellant's managing director to the Freight Agents' Association of Los Angeles, dated March 6, 1961, states:

> "This will acknowledge your letter of February 16, 1961. It was my opinion that all freight charges due were being paid in the published period of time. I would appreciate it if you would call to my personal attention any freight bill that is paid beyond your credit period so that the proper steps can be taken to correct the situation immediately.
>
> "I am well aware of the restrictions governing your credit allowance set down by the Interstate Commerce Commission and I can assure you we will make every effort to adhere to them."

(i) *Exhibit 38,* a letter to appellant dated March 13, 1961, states:

> "Our records indicate that your settlement of freight transportation charges, is not being made within the authorized credit period as prescribed by order of the Interstate Commerce Commission. *The law requires both shipper and carrier to comply with the order, and provides heavy penalties for violations.* The following bills are unpaid and past due: . . . Please forward your check by RETURN MAIL."

(j) *Exhibit 39,* a letter to appellant dated March 16, 1961, similar to Exhibits 33, 35, and 36, warns appellant of delinquencies.

(k) *Exhibit 40,* a letter to appellant dated November 29, 1961, similar to Exhibits 33, 35, 36 and 39, warns appellant of delinquencies.

(l) *Exhibit 41,* a letter to appellant dated December 29, 1961, similar to Exhibits 33, 35, 36, 39 and 40, warns appellant of delinquencies.

(m) *Exhibit 42,* a letter to appellant dated January 15, 1962, similar to Exhibit 38, contains the statement:

> "Forward your check by RETURN MAIL to prevent SUSPENSION of credit."

(n) *Exhibit 43,* a notice of credit suspension dated February 6, 1962, similar to Exhibit 34.

(o) Mr. Andreas and his subordinates contacted appellant about 75 to 100 times concerning freight bills that were not being paid on time. [R.T. 178, 186.] Appellant's representatives were informed that it was important to pay freight bills on time. [R.T. 208-209.]

In view of the items mentioned above, it is plain that the evidence was more than sufficient to sustain appellant's conviction, especially since on appeal the evidence is taken in the light most favorable to the Government. *Glasser v. United States,* 315 U.S. 60 (1942); *Bolen v. United States,* 303 F.2d 870 (9th Cir. 1962); *Young v. United States,* 298 F.2d 108 (9th Cir. 1962), *cert. denied* 370 U.S. 953 (1962); *Benchwick v. United States,* 197 F.2d 330 (9th Cir. 1961); *Teasley v. United States,* 292 F.2d 460 (9th Cir. 1961); *Sandez v. United States,* 239 F.2d 239 (9th Cir. 1956).

D. The Trial Court Did Not Err in Receiving Evidence.

1. Exhibits 31, 33, 34, 35, 36, 38, 39, 40, 41, 42 and 43 Were Properly Admitted Into Evidence.

The above exhibits were offered by the Government to show that appellant knew it was not paying its bills within the credit period required of all shippers, and not to prove what the law is. [R.T. 82-83, 92, 95, 98-99.] The Government said:

> "We are not offering it [Ex. 31], to prove to the jury what the law is. We will draft to the court an instruction telling them very plainly that it is offered—this letter is offered to show the Continental Shippers received this letter notifying them they are not paying on time." [R.T. 82-83.]

Counsel for appellant objected to the introduction of the above exhibits on the ground that they contain "prejudicial" "conclusions of law." [R.T. 82, 84, 89-90, 91, 95-96.]

The court said:

> "The objections are overruled and the Court will instruct the jury these references as to law are not to be considered by them in any sense or to any degree.
>
> "The Court will instruct them as to the law and that the letters are not to be considered by them as evidence of what the law is in any sense of the word." [R.T. 97.]

Thereafter, the Court instructed the jury as follows:

> "Now ladies and gentlemen, these exhibits require some explanation. Exhibit No. 31, in the

exhibit there is a statement, 'The law requires both shipper and carrier to comply with the order and provides heavy penalties for violations.'

"I instruct you you are not to consider in any respect any statement in any of these exhibits as to what the law is. The Court will instruct you as to the law to be applied by you, as to what the law is with respect to these charges before the case is finally submitted to you.

But I instruct you now you are not to consider anything that you read in any of these exhibits concerning what the law is. You are to disregard it entirely.

In Exhibit 33 there is the provision, a statement, 'We have previously advised you that it is unlawful for carriers to extend credit beyond the period provided by the rules of the Interstate Commerce Commission.'

"All of these statements—I was merely giving you an example—and any statement which purports to set forth what the law is you are to disregard entirely. Is that clear?" [R.T. 99-100.]

In its argument of the case, the Government made the following remarks to the jury while discussing Exhibits 31 through 43:

"There is a brief paragraph with respect to the law and the Court has already instructed you to disregard what this paragraph says and take the law from the Court's instructions, so I won't read that to you." [R.T. 429.]

* * * * *

"I will not read that part dealing with the law, because the Court has instructions to you as to what to do with those." [R.T. 431.]

* * * * *

". . . and again disregard the statement as to what the law is . . ." [R.T. 432.]

An admissible document is not made inadmissible because it contains some incompetent matter. *Baltimore & O.R.R. v. Filgenhower,* 168 F.2d 12, 17 (8th Cir. 1948); *England v. United States,* 174 F.2d 466 (5th Cir. 1949). The clear instructions of the Court which were carefully followed by Government counsel adequately safeguarded appellant against possible prejudice from the "conclusions of law" to which appellant objected, and the admission into evidence of Exhibits 31, 33, 34, 35, 36, 38, 39, 40, 41, 42 and 43 was therefore not error.

2. Testimony Received Did Not Violate the Best Evidence Rule.

During the course of the trial, the Government asked the following questions and received the following answers:

"Q. Now, Mr. Schafer, in your business, in the course of your duties there at the Southern Pacific Company, in the Cashier's Office, have you become at all familiar with the manner in which shippers generally pay their bills, whether late or early? A. Yes." [R.T. 110.]

Counsel for appellant made the following objection:

"If the Court please, the records of the Southern Pacific Company are the best evidence of the answer to that question. I object to that on that ground." [R.T. 110.]

The Court overruled the objection [R.T. 111] and the Government asked the following question:

> "Q. Now, about what percentage of all those freight bills that you handle [Southern Pacific's Los Angeles freight bills for the preceding year] are paid within this 120-hour period, as best you can estimate? [R.T. 112-113.]

Counsel for appellant interposed the following objection:

> "We object, your Honor, on the ground it calls for the conclusion of this witness. Percentage would not be material. The defendant in this case is charged with unjust discrimination, and I emphasize the word 'unjust.' * * * The records of the Southern Pacific Company are the best evidence of when the shippers pay, how much they pay, when they pay and if it is the date or after the date as stamped on the invoice. * * *
>
> This calls for a conclusion of this witness. The records of the Southern Pacific Company will indicate whether this shipper was treated different than all the rest." [R.T. 113.]

The Court overruled the objection [R.T. 114] and the witness then said that approximately 95 per cent [R.T. 114] and ultimately 99.9 per cent [R.T. 117] of freight bills mailed are paid within the credit period.

Appellant's objections above and its specification of error No. 7 (Appellant's Opening Brief, p. 27) show that appellant contends the above testimony was received contrary to the "best evidence" rule.

As applied in Federal Courts, the "best evidence" rule is limited to cases where the contents of a writ-

ing are to be proved. *Keene v. Meade,* 28 U.S. 1 (1830); *Herzig v. Swift & Co.,* 146 F.2d 444 (2d Cir. 1945); *In re Ko-Ed Tavern,* 129 F.2d 806 (3d Cir. 1942); *R. Hoe & Co. v. Corvir,* 30 F.2d 630 (2d Cir. 1929); *Boitano v. United States,* 7 F.2d 324 (9th Cir. 1925). The "best evidence" rule amounts to no more than the requirement that the contents of a writing must be proved by the introduction of the writing itself. *Herzig v. Swift & Co., supra.*

In *Meyers v. United States,* 171 F.2d 800 (D.C. Cir. 1948), *cert. denied* 69 S. Ct. 602 (1949), it was held that oral testimony of a person who heard statements of the defendant made before a Congressional Committee was admissible to establish what the defendant said in his statements, even though a reporter's transcript of the statements was also available, because the oral testimony was not offered to prove what was in the transcript, but what the defendant had said. The same result was reached in *Brzezinski v. United States,* 198 Fed. 65 (2d Cir. 1912), as to the oral testimony of a person who heard the defendant's statements made before a Grand Jury, which statements were also contained in a reporter's transcript. To the same effect is *Boitano v. United States,* 7 F.2d 324, 325 (9th Cir. 1925), in which the Court said ". . . it was equally competent to prove . . . testimony by a witness who was present at the trial and heard the testimony given, regardless of whether the testimony was reported or whether it was not."

The Court in *In re Ko-Ed Tavern,* 129 F.2d 806, 810 (3d Cir. 1942), held that oral testimony as to who owned the shares of a bankrupt corporation was admissible, and that the matter need not be proved

by the books of the corporation. The Court further stated that the "best evidence" rule was not involved since the oral testimony was not offered to establish the terms of a writing.

In *United States v. Kushner,* 135 F.2d 668, 674 (2d Cir. 1943), *cert. denied* 320 U.S. 212 (1943), it was held that oral testimony to the fact that a withdrawal had been made from a bank was admissible even though a written bank statement showing the withdrawal was available, since the oral testimony was not offered to prove what was in the written statement, but merely what had occurred.

In *Gantz v. United States,* 127 F.2d 498 (8th Cir. 1942), in a prosecution of a manager of a brokerage company for violating the Securities Act, testimony of a witness as to what equity was in her account at a particular time was held admissible, and not objectionable on the ground that a written record was the best evidence.

In *United States v. Waldin,* 253 F.2d 551 (3rd Cir. 1958), it was held that the "best evidence" rule does not require the best possible evidence to prove a given point, but is properly confined to situations where the contents of a writing are in issue.

The Government did not elicit the testimony of Mr. Schafer to show the contents of Southern Pacific Company's records, but to prove the fact of what had occurred with respect to the payment of freight bills. In view of this, the "best evidence" rule had no application and the testimony was properly received.

Appellant also alleges that error was committed in receiving the testimony of Horace A. Sumner contrary

to the "best evidence" rule. During the trial, the Government asked the following questions and received the following answers:

> "Q. Mr. Sumner, in the course of your duties have you had any occasion to become aware or familiar with the manner in which the defendant corporation has been paying its bills. A. Yes." [R.T. 63.]

Counsel for appellant interposed an objection as follows:

> "The Court please, I think the record will speak for itself in that respect. I object to the conclusion of this witness, paraphrasing his thoughts as to what the record has been." [R.T. 63.]

Thereafter, the following colloquy took place:

> "The Court: Won't the record show it?
>
> Mr. Nissen: What record, your honor? The fact of payment—[R.T. 63.]
>
> The Court: When these bills were actually paid.
>
> Mr. Nissen: The Government is not confined to the bills in issue in the case, we believe, and we want to show there have been. . . . [R.T. 64.]
>
> The Court: You are trying to show knowledge?
>
> Mr. Nissen: The Government is charged with showing knowledge.
>
> The Court: That is what you are trying to show?
>
> Mr. Nissen: That is right. In order to show knowledge we are entitled to show prior acts of similar nature. [R.T. 64.] * * *
>
> The Court: Knowledge of what?
>
> Mr. Nissen: Knowledge of the fact that they

were [R.T. 64] paying late, they were late, delinquent. They were receiving credit that was not allowed or obtainable by others.

The Court: What is the best evidence to show that?

Mr. Nissen: This is not a best evidence problem. It is not a document in issue. In other words, we are not trying to show the contents of a document. Payment late or early is a fact independent of documents.

The Court: You are asking this witness for information that is documented, aren't you?

Mr. Nissen: If we have to, we could bring up a carload, every single communication on every single shipment and show it to the Court. We have made a study of this and it is voluminous. You just can't do it. [R.T. 65.]

* * * * *

The Government is not trying to prove any specific shipment was late. It wants to prove the pattern of paying late, and that they had notice—

The Court: You don't prove a pattern by just a shotgun question. You prove a pattern by showing in various instances they did this and that is the pattern.

Mr. Nissen: Is it the Court's position I have to show they were late in each instance?

The Court: It all depends on what the witness can testify to I am not going to let him testify in great generalities. What you should have done is have him make a summary. [R.T. 66.]

* * * * *

Mr. Nissen: . . . . Personally sir, I feel the Court is confusing best evidence with a person's ability—

The Court: You are talking about a pattern. You say you are trying to prove a pattern. What is a pattern?

Mr. Nissen: They were habitually late in payment, chronically late in payment. . . . [R.T. 67.]

The Court: Doesn't he know they were late in payments so many times?

Mr. Nissen: Not specifically, because—

The Court: Why didn't he look into it and find out?

Mr. Nissen: They made the study for the one period. They haven't made the study prior—

The Court: You are talking about this one period. Are you talking about prior to the period of the study?

Mr. Nissen: I was going to ask him for the whole period, when they started the period.

* * * * *

The Court: I think you ought to be limited to the period he made a statement. [R.T. 68.]

* * * * *

The Court: My position is he has to have made a study to know what he is talking about, rather than just basing it on—

Mr. Nissen: He had day-to-day contact with it He knows there is no other shipment—

The Court: He has had day-to-day contact and if he has made a study of it, he knows. I will limit it to the time he made the study." [R.T. 69.]

Counsel for appellant questioned witness Sumner on *voir dire* and made the objection indicated below:

> "Mr. Stevens: Mr. Sumner, you referred to a study.
>
> Did that study result in writing a compilation?
>
> The Witness: Yes, it did.
>
> * * * * *
>
> Mr. Stevens: I think if that be the case then, the court please, the study would be the best evidence and not the witness' testimony of the fact.
>
> Mr. Nissen: The Government still says that this is not a best-evidence problem. We are not trying to prove what is in the study, we are trying to prove independent facts, payments or not." [R.T. 70.]

Thereafter, the Court overruled appellant's objection [R.T. 74] and the following question and answer ensued:

> "Q. . . . Will you tell us approximately how many delinquencies were covered by the studies and up to the time of the charge? A. Approximately 87 delinquencies." [R.T. 75.]

Inasmuch as Sumner's testimony was elicited to prove appellant's prior failures to pay within the credit period, rather than to prove what was contained in the written compilation resulting from a "study" of appellant's delinquent payments, the "best-evidence" rule has no application. The "study" was not asked about or even mentioned until counsel for appellant objected to Sumner's oral testimony as to appellant's previous delinquencies based on his own experience in handling appellant's account, on the ground that it was not the best evidence. After this objection, the Court sought

to confine the witness' testimony to matters of which he had made a "study" stating: "My position is he has to have made a study to know what he is talking about. . . ." [R.T. 69.]

Even if witness Sumner's testimony is viewed as an oral statement of what the written compilation resulting from the study contained, there would be no error since: (1) the writing was made by Sumner's office under his supervision and control [R.T. 71] (2) the writing was marked for identification and handed to appellant's counsel [R.T. 73] (3) the records from which the written compilation was made were ordered made available if appellant's counsel wished to see them. [R.T. 70.] Thus, the written compilation would qualify as a proper summary of voluminous records under cases such as *Stevens v. United States,* 206 F.2d 64, 67 (6th Cir. 1953).

Even if the Court erred in receiving Sumner's testimony referred to above, the error was harmless, especially since appellant introduced a compilation [Defense Ex. Q; R.T. 364] which showed appellant was delinquent in paying its freight bills on at least 75 occasions between December, 1960 and May, 1961—virtually the same as the evidence to which Sumner testified.

3. Evidence of a Telephone Conversation With a Representative of Appellant Was Properly Received.

The issue raised by appellant's specification of error No. 8 (Appellant's Op. Br. pp. 27-28) is whether a telephone conversation allegedly emanating from appellant was properly authenticated. Mr. Platz, assistant terminal freight agent for Southern Pacific Company, testified that on February 6, 1962, he received a tele-

phone call from an individual who identified himself as Mr. Essaf, Treasurer of Continental Shippers' Association. The call was originally placed for Mr. Sumner, the freight agent, who was out. The caller stated that there would be a reorganization of Continental Shippers' Association, and because of this the association would be a little slow in the payment of its bills. The reorganization and lateness in payment later occurred as the caller said they would. [R.T. 153-158; See also Ex. 44.] After this foundation was laid, the court allowed the substance of the conversation to be given. [R.T. 158.]

A leading case on this issue is *Van Riper v. United States,* 13 F.2d 961, 968 (2d Cir. 1926), which involved the authentication of telephone calls by persons identifying themselves as representatives of the defendant. In an opinion by Judge Learned Hand, the Court held that the callers were sufficiently identified by the circumstances and substance of the conversation itself, inasmuch as the calls were placed to persons with whom the defendants had been dealing, and the calls concerned a subject (the selling of Parco stock) which only the defendants were likely to be concerned with. See also *Hartzell v. United States,* 72 F.2d 569, 578 (8th Cir. 1954); and *Jarvis v. United States,* 90 F.2d 243, 245 (1st Cir. 1937).

In the present case, the telephone call was placed to a company (and a particular person within that company) with which appellant had been dealing. The subject of the telephone conversation was one which only appellant was likely to be concerned with. Matters forecasted in the telephone conversation indicated inside knowledge of appellant's operations, and these

matters subsequently occurred as predicted. These circumstances constitute sufficient proof of the identity of the caller as a representative of appellant.

As was said in *United States v. Lo Bue,* 180 F. Supp. 955 (S.D.N.Y. 1960), where the foundation proof consists of an aggregate of circumstances establishing that it is highly improbable that the caller was anyone other than who he purported to be, there is sufficient proof of the identity of the speaker.

E. The Court Did Not Err in the Giving or Refusing of Instructions.

1. Instructions as to I.C.C. Regulations Were Properly Given. [Government's Proposed Instruction, Set 2, No. 3, C. T. 131, as Modified and Given by the Court at R. T. 501-504].

Appellant objected to instructions on Interstate Commerce Commission regulations pertaining to credit for freight charges on the ground that the regulations were not material. [R.T. 265.] However, these regulations were in existence, and when coupled with the presumption that the law has been obeyed, they tended to show that credit of other shippers had been restricted to the period permitted by the regulations while appellant obtained credit for longer periods—thus indicating a discrimination had been practiced and an advantage obtained.

Those who obtain benefits in respect to rail transportation contrary to the rules of the Interstate Commerce Commission have been convicted of Elkins Act Violations. Thus, In *Dye v. United States,* 262 Fed. 6 (4th Cir. 1919), in which a rule of the I.C.C. provided for distribution of railroad cars among various mines, a person who obtained more cars than he was

entitled to under the rule was held to have violated the Elkins Act. Also, in *United States v. Michigan Portland Cement Company,* 270 U.S. 521 (1926), where the I.C.C. had promulgated a priority order concerning coal cars, a defendant who obtained an assignment and transportation of coal cars contrary to the I.C.C. priority order was held to have violated the Elkins Act. In view of the circumstances and cases mentioned above, the I.C.C. regulations were material and the proper subject of instructions to the jury. It should also be noted that these regulations were already before the jury as parts of Exhibits 32 and 32A, the latter of which was received without objection by appellant.

Appellant further objects (Appellant's Op. Br. pp. 32-33) that "Nowhere does the Court or the Government explain how 'they (the regulations) do relate to matters involved in this case' . . . "However, in its opening statement the Government explained the relevance of the I.C.C. regulations [R.T. 29] and continued to do so throughout the trial. [R.T. 40-41, 426, 486]. The Court instructed the jury that appellant was "not being prosecuted for violation of the Interstate Commerce Act or of the regulations under that Act; however, they do relate to the matters involved in this case . . ." [R.T. 501] as was obvious from the testimony of Mr. Sumner. [R.T. 43-44.]

Appellant's contention that the jury used the I.C.C. regulations as the basis for convicting appellant is clearly without merit since it is based solely on the jury's request during its deliberations. "May we have the indictment and the date of filing suit in Superior Court, S.P. v. Continental Shippers." The jury merely

asked for a copy of the charges against appellant and wanted to know when Southern Pacific sued Continental Shippers civilly for freight charges due. The Government cannot see how this jury request shows that the time periods of the regulations were "used by the jury as the basis to assess the guilt of appellant" (Appellant's Op. Br. p. 33), as appellant contends.

2. The Instruction as to What Constitutes a "Concession" or "Discrimination" Was Correct. [Government's Proposed Instruction, Set 2, No. 8, C. T. 138 as Given by the Court at R. T. 506.]

The case of *Hocking Valley Ry. Co. v. United States,* 210 Fed. 735 (6th Cir. 1914), *cert. denied* 234 U.S. 757 (1914), held that the obtaining of credit for freight charges by one shipper for periods longer than those available to other shippers constitutes a concession or discrimination under the Elkins Act.

In the *Hocking* case, the shipper gave a note for its indebtedness on freight charges and agreed to pay interest thereon. In the present case, appellant obtained credit extensions without the detriment of paying interest, and the discrimination and concession involved is consequently greater. The first 24 Counts against appellant involve benefits which virtually amount to one hundred percent pre-obtained rebates, inasmuch as appellant shipped its goods and had not paid for the shipments up to the time of trial almost one year later. Appellant's only objection to the above instruction is that there was no evidence of extension of credit to support it. [R.T. 268-269.] Appellee's Statement of Facts adequately answers this contention.

3. **The Court's Instruction on Intent Was Correct. [Government's Proposed Instruction, Set 2, No. 9, C. T. 130, as Modified and Given by the Court at R. T. 506-507.]**

Boone v. United States, 109 F.2d 560 (6th Cir. 1940);

United States v. General Motors Corp., 226 F. 2d 745 (3d Cir. 1955).

4. **The Court's Instruction With Respect to Knowledge of or Collusion by the Carrier Was Correct. [Government's Proposed Instruction, Set 1, No. 7, C. T. 88, as Given by the Court at R. T. 507.]**

The classic refutation of appellant's assertion that a carrier and shipper must knowingly act in concert in order to violate the Elkins Act is found in *United States v. Koenig Coal Co.,* 270 U.S. 512 (1926). That case involved an I.C.C. order allocating railroad coal cars. By deceit, the defendant shipper obtained more than its share of such cars *without* the knowledge of the railroad carrier. A lower court decision that an Elkins Act violation "cannot be committed without the guilty knowledge and collusion of both the shipper and the carrier," was reversed by the Court which held that "the act is plainly not confined to joint crimes."

5. **The Court Correctly Instructed on the Law of Agency. [Government's Proposed Instruction, Set 2, No. 12, C. T. 142, as Given by the Court at R. T. 507.]**

Government's Proposed Instruction No. 8 reads as follows:

> "A corporation is criminally responsible for acts committed by its agents, provided such acts were committed within the scope of the agents' authority or in the course of the agents' employment.

"The composite knowledge of a corporation's officers, agents, and employees, is attributable to the corporation for the purpose of determining criminal responsibility under the Elkins Act."

Counsel for appellant made the following objections:

"I am going to object to that unless that is coupled with instructions on knowledge in this particular case, your Honor, and made clear that it is so coupled with the element of knowledge. [R.T. 276]

* * * * *

"In one part the Government says knowledge isn't necessary, and here it is. Knowledge of what? That is the point. Knowledge of intention to violate the Act, knowledge that the Act is being violated? Knowledge of willfulness? I mean—" [R.T. 277.]

"That is the point, if the Court please. What I am trying to say is the fact that this is susceptible of being the knowledge of the corporate officers of an act of an agent. That is, such as going through a red light, which is the violation, is doing the act itself, regardless of the intent. [R.T. 277].

"The position of the defendant is that unless this instruction is knowledge of the corporation's officers, in line with the willfulness and intent to violate the statute—" [R.T. 278.]

"The Court: This doesn't say that, though.

Mr. Stevens: I know it doesn't. That is my objection.

The Court: Well, I know, but you can't include in it something that it doesn't say.

Mr. Stevens: The question, as I understand the court, is do I object to this instruction as it is, and I do.

The Court: What is your ground of objection?

Mr. Stevens: The failure that it isn't complete.

The Court: In what regard?

Mr. Stevens: In the regard it doesn't spell out the element of knowledge as embodying willfulness." [R.T. 278.]

Appellant's entire objection seems to be that the above instruction did not deal completely with the element of knowledge. However, as the Court noted [R.T. 277], this is a general instruction on agency. The Court gave full instructions on knowledge as follows:

"An act or failure to act is done knowingly and not because of mistake or inadvertance or other innocent reason. [R.T. 504]

"Now, three essential elements are required to be proved in order to establish the offense charged in the information: FIRST: * * * SECOND: * * * THIRD: Knowledge of the defendant that it was obtaining such a concession or discrimination." [R.T. 504-505.]

"The penalty of the Elkins Act is not imposed for unwitting failure to comply with the statute, but for intentionally, knowingly, or voluntarily disregarding the provisions of the Act . . ." [R.T. 506.]

"You are instructed that the defendant is charged with unlawfully and knowingly violating the provisions of Section 1 of the Elkins Act, of which I have read the pertinent portions to you.

I instruct you that this means that the defendant knowingly did the act or acts set forth in the information. [R.T. 507-508]

"The word 'knowingly' was inserted in the law by Congress for the definite purpose of excluding unintentional, accidental or unwitting acts from its purview. [R.T. 508]

"Therefore, if you entertain a reasonable doubt that any act or omission on the part of the defendant in regard to whether it was knowingly done or was done unwittingly or accidentally or unintentionally, you must render a verdict of not guilty." [R.T. 508.]

"You will note that the acts charged in the Information are alleged to have been done 'knowingly.' The purpose of adding the word 'knowingly' was to insure that no one would be convicted for an act done because of mistake or inadvertenance or other innocent reason." [R.T. 508.]

In view of the full and complete instructions given by the Court with respect to the element of knowledge, appellant's specification of error concerning the above instruction is without merit.

6. The Court Correctly Instructed With Respect to Discrimination and "Unjust" Discrimination. [Government's Proposed Instruction, Set 2, No. 6, C. T. 136, as Modified by the Court and Given at R. T. 504.]

The Interstate Commerce Act, 49 U.S.C. §3(2) prohibited carriers from releasing freight to shippers until freight charges were paid, but authorized the Interstate Commerce Commission to make exceptions to this rule for the purpose of governing the settlement of such charges and to prevent unjust discrimination.

The I.C.C., acting under this authority, apparently recognized that shippers with offices at the point of delivery could more easily and quickly obtain release of their freight by paying the charges, than could shippers with distant offices to which freight bills must be sent and from which payment checks must be received before release of freight could be obtained. Apparently to eliminate this inequality, and to facilitate the release of railroad equipment and station facilities, the I.C.C. promulgated Ex Parte order 73, under which freight could be released immediately to the shipper who then had 120 hours—a reasonable mail transaction time—in which to pay the freight charges. In short, Congress authorized the I.C.C. to make exceptions to the statutory rule when necessary to prevent unjust discrimination which would otherwise result; and the I.C.C. did so.

Appellant now insists that the term "unjust discrimination", as used by the Interstate Commerce Act in giving the I.C.C. rule making authority, be carried over into the Elkins Act and applied to inequalities in treatment obtained by shippers. In fact, the Elkins Act prohibits "discrimination" without regard to whether it is "unjust," and the Court was correct in so instructing the jury.

7. The Court Was Correct in Refusing Appellant's Proposed Instruction No. 19. [C. T. 111; R. T. 288-291.]

Appellant requested that the above instructions be given so it could argue that its acquittal in the previous case entitled appellant to think that the credit extensions charged in the present case were lawful. As the Court noted [R.T. 289-290], this argument is fallacious since the offenses in the previous *and* present

cases *all* occurred *before* appellant was acquitted in the previous case. Therefore, in no sense could appellant's violations in the present case be said to result from reliance on the Court's decision in the first case. Furthermore, good faith is not a defense to a prosecution for violation of the Elkins Act. *Central R. Co. of New Jersey v. United States,* 229 Fed. 501 (3d Cir. 1915); *cert. denied* 241 U.S. 658 (1915).

8. The Court Was Correct in Refusing Appellant's Proposed Instruction No. 23. [C. T. 115; R. T. 297-299.]

At no time did appellant object to the Court's failure to define the word "accept" [R.T. 513]; therefore, the point cannot be raised on appeal. *Federal Rules of Criminal Procedure,* Rules 30 and 51. Further, the instruction proposed by appellant would limit the meaning of the words "accept" and "receive" to definitions used in contract law and would require concert of action between a carrier and shipper before the Elkins Act is violated, contrary to the law enunciated in *United States v. Koenig Coal Co.,* 270 U.S. 512 (1926). Also, the Court's instruction that "[t]he words used in the Information and in the Elkins Act and in the Interstate Commerce Act and the Regulations are to be given their ordinary meaning as derived from everyday usage, and they are not to be restricted to any one particular or technical meaning" [R.T. 506] was an adequate instruction on the meaning of the statutory terms involved.

9. The Court Correctly Refused Appellant's Proposed Instruction No. 26. [C. T. 118; R. T. 513.]

At no time did appellant object to the Court's refusal to give the above instruction [R.T. 513]; therefore, the matter cannot be raised as error on appeal.

Federal Rules of Criminal Procedure, Rules 30 and 51. Furthermore, the Court had already adequately instructed the jury as to the three essential elements of the offense [R.T. 505], and was not thereafter required to pick out a single item of proof and tell the jury that that item alone was insufficient for conviction. Appellant was merely seeking the Court's assistance in its effort to becloud the other issues in the case and to convince the jury that the sole issue was whether or not the failure to pay bills on time constituted a crime.

VI.
CONCLUSION.

For the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID R. NISSEN